United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1146

ORIGINAL

73-8435

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 73-8435

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ROBERT MAHER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ROBERT MAHER

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Preliminary Statement

The Appellant, ROBERT MAHER, appeals from a Judgment of Conviction in the United States District Court for the Southern District of New York, entered on November 18th, 1973, judging him guilty, after a jury trial, of violating Title 21, United States Code, Sections 173 and 174. As a result of this conviction, the Appellant was sentenced to

ten years imprisonment and fined in the amount of $10,000.

STATEMENT OF THE FACTS

In support of the charges against ROBERT MAHER, the Government relied primarily on the testimony of Doris Olivero, a heroin addict whose habit required up to $1,000.00 per day to support. (T 94) Doris Olivero testified that during the period in question, she had lived with Santiago Olivero as his common-law wife. (T 93) According to Mrs. Olivero, the couple gained their support through the sale and distribution of heroin. (T 100) Testimony regarding the source of their retail narcotics operation focused on the Appellant's co-defendant, Angelo Trabacchi[1], and ultimately to the Appellant himself.

With complete uncertainty as to the dates relative to the Indictment, the witness Olivero testified that some time in 1968 or 1969, she first saw the defendant Trabacchi, at Manhattan Beer Distributors in the East Harlem section of Manhattan. (T 94 - 95) Accompanied by Santiago "Sam"

[1] Because of the jury's inability to agree on any count as against Trabacchi, a mistrial was declared and the case was assigned to another District Judge.

Olivero, the witness described a mildly ingenius subterfuge during which the ostensible sale of beer was an actual purchase of heroin. (T 96 - 97) One or two weeks later, the witness testified, the procedure again followed. (T 98) On each occasion that the narcotic was allegedly picked up at the Manhattan "distributor", Sam Olivero brought large amounts of cash in a brown paper bag. (T 99) The witness's familiarity with the monies delivered was based on her assertion that she had participated in counting it. (T 99) Although it was apparent that the witness's memory was less than keen, there was a recollection of some four or five times that heroin was allegedly picked up in this manner. (T 99) Routinely, after completing the purchase, the witness and "Sam" returned to their Brooklyn apartment where the weighing, cutting and attendant procedures took place in preparation for resale. (T 100)

After recounting these alleged episodes, the witness's testimony focused on the Appellant, ROBERT MAHER. The witness stated that the first time she saw the Appellant, he was in the company of his co-defendant at Manhattan Beer. (T 106) Recalling that first date, she remained in the car

while Sam, Trabacchi and the Appellant went inside the premises. (T 106) Five or ten minutes later, when Sam returned to the car, he informed the witness that "I met the big man". (T 106) On this occasion also, heroin was allegedly transferred in a beer case placed in the trunk of the witness's automobile. (T 107) Although Mrs. Olivero stated that at the time of the meeting, she was pregnant with a baby born in September of 1969, not even an approximate date of the meeting could be fixed. (T 107)

The second occasion on which the witness met the Appellant was "shortly after" September 22nd, 1969 in a bar in Bronx County. (T 108) At that bar, she sam Sam Olivero, Angelo Trabacchi, the Appellant and other persons converse in a corner of the barroom, apparently outside of her hearing. (T 108 - 109) After the conversation, Sam confided in the witness that "I'm going to do business with Bob, now, I don't have to do business with Angelo anymore". (T 109) Sam also related that the new procedure would be to use Trabacchi as a conduit to call the Appellant. (T 110)

Later incidents concerning the Appellant included a visit to Lower Manhattan where MAHER was working on a construction job, where money was allegedly handed to MAHER in

exchange for narcotics. (T 111 - 112) Two weeks later, a similar transaction was allegedly completed. (T 112)

Subsequent to the two alleged "buys" in Lower Manhattan, the situs of the illicit trade, the witness testified, was changed to Brooklyn where the Appellant was now working. (T 113) Again, uncertain as to time and place, the witness recalled buying narcotics from the Appellant somewhere in "Bay Ridge". (T 115)

Shortly after the Brooklyn "meetings", the situs again changed to the Bronx. (T 115) The witness then testified that there were between three and five transactions on Mc Lean Avenue with no significant variation in the procedural aspects of the sale. (T 117)

Finally, in November of 1970, the Olivero's drug trafficking activity was interrupted by the arrest of Sam Olivero and shortly thereafter, the witness herself. (T 118 - 119) The arrest of Doris Olivero, at her home on Vanderveer Avenue in Queens, New York, produced the disclosure of a quantity of drugs that she had secreted in her house. (T 119) Thereafter, according to the witness, the Appellant, MAHER, after learning of Sam's arrest, indicated that he would help in

the event that there was a problem concerning bail. (T 120)

The next event testified to by the witness concerned a trip by her to Puerto Rico in February or March of 1971. (T 120) With Sam and a friend, Joaquin Quinones, Doris stayed at the Racquet Club Hotel until Sam instructed her to return to New York with Quinones in order to sell a half kilo of heroin. Doris testified that she was further instructed to see the Appellant on Gunhill Road in the Bronx. (T 121) However, this meeting never occurred because of the witness's inability to "find the place". (T 121) Because this sale was aborted, the witness testified that at a later time, she and Sam met with the Appellant on Gunhill Road in what was described as another purchase of heroin. (T 122 - 123) The last transaction testified to by the witness ended with the arrest of the Oliveros, Quinones and the Appellant. (T 124 - 125) Quite ironically, on the night of arrest, there was for no apparent reason a change in procedure which resulted in the arresting officers finding no drugs at that time. (T 125) Thereafter, a Detective Rainey accompanied the witness to her house where drugs, which were allegedly purchased from the Appellant the night before, were produced.

(T 125 - 126) Again, after this arrest, there was an indication that the Appellant was going to help bail Sam. (T 127)

In May of 1971, the witness testified, the Oliveros returned to Puerto Rico. (T 128) During their stay, Doris was alleged told by Sam that he was still getting his "stuff" from the Appellant. (T 128) Thereafter, Doris was sent by Sam to their home in New York to obtain heroin stored in their house and bring it to Puerto Rico. (T 129) Unable to sell the heroin in Puerto Rico, Sam departed for New York leaving Doris behind with the heroin because of the increased airport security. (T 129) On May 28th, 1971, the witness was arrested in her hotel room in Puerto Rico while trying to retrieve the heroin from a storage place in the ceiling. (T 130 - 131)

Carmen Berrerra testified that she was acquainted with Sam Olivero and "sometime" in the Fall of 1970, she was introduced to the Appellant through him. (T 245) Thereafter, the witness described the transfer of a package which, according to Sam, contained "dope". (T 247) In exchange, a large sum of money, Miss Berrerra testified, was given to

the Appellant. (T 247 - 249) Recalling only that this incident occurred in Bronx County, Berrerra also placed reference to time in the context of when she gave birth. (T 248)

Rubin Bankhead, a New York City detective, testified to a surveillance of the Appellant in October of 1969 at which time MAHER was seen in conversation with an unidentified male who drove a car registered to Doris T. Olivero. (T 265) In cross-examination, Bankhead testified that, although he surveilled MAHER for one or two months, he never saw the transfer of any packages. (T 267)

Bernard Udell, an attorney, testified that in 1971 he represented Santiago Olivero. (T 279) Udell further testified that in the Spring of 1971, he received money from one Theodore Stein, then the Appellant's attorney, for Santiago's bail. (T 280 - 281) Additional circumstantial evidence included the testimony of Advin Glasgow, an employee of a New Jersey Bank, who testified to large deposits into the account of Angelo Trabacchi.

John O'Neill, a Special Agent with the Drug Enforcement Administration, recounted the events of November 13th, 1970 which led to the arrest of Santiago Olivero and Quinones, who were interrupted by him during the sale of narcotics.

Robert O'Connor, another Federal agent, related that on November 16th, 1970, a search warrant was executed at the Olivero residence on Vanderveer Avenue in Queens at which time heroin was discovered. (T 312)

In terms of the Government's case against the Appellant, MAHER, perhaps the second most important witness was John Rainey, a detective in the New York City Police Department. Rainey testified to first meeting with Doris Olivero on February 6th, 1971, when he placed Sam Olivero and Quinones under arrest. (T 319) On February 22nd, 1971, Rainey again met Mrs. Olivero when apparently for the second time, he arrested her husband. (T 320) It appeared that this second arrest was the product of information supplied by Doris Olivero. (T 321) Further information supplied by Mrs. Olivero prompted the detective to conduct a surveillance of the Appellant. (T 324) This surveillance continued until March 22nd, 1971 when Rainey allegedly observed Sam Olivero hand a brown paper bag to the Appellant on a construction site in the Bronx. (T 320) Observation of the Olivero couple and the Appellant continued to March 23rd, when both the Appellant and the Oliveros were placed under arrest. (T 331) Although there had been an apparent moratorium on

Doris' cooperation with Rainey, after the arrest Doris took Rainey to a residence on Pitkin Avenue in Brooklyn where she turned over a quantity of heroin which allegedly had been purchased from the Appellant the evening before. (T 332) Later testimony of Rainey focused on a surveillance of Manhattan Beer Distributors in April of 1971 wherein the witness observed what he alleged to have been narcotics transactions. (T 349 - 351)

Bernard Colter, an agent with the Federal Drug Enforcement Administration, recounted the events of Mrs. Olivero's arrest in the hotel in Puerto Rico where she was found in possession of a quantity of heroin. (T 393)

Both the Appellant, ROBERT MAHER, and his co-defendant, Angelo Trabacchi, testified on their own behalf. (T 420, 450) Although the Appellant admitted knowing Sam Olivero, he flatly denied any complicity in the illicit trafficking of drugs. (T 462)

STATUTES INVOLVED

Title 21, United States Code, Section 173, states in part as follows:

> "Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported."

Title 21, United States Code, Section 174, states in part as follows:

> "§174. Same; penalty; evidence
>
> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to

law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

QUESTIONS PRESENTED

1. Whether the Appellant's right to due process of law was denied by the pre-accusatory delay and the Trial Court's denial of counsel's Motion for a one-week adjournment to prepare a defense to an Indictment that had been filed less than one month earlier?

2. Whether the Trial Court's refusal to instruct the jury that they may only consider the hearsay declarations of a co-conspirator only if they find that the Appellant joined in the conspiracy was reversible error.?

3. Whether the prosecution of the Indictment herein was barred by the doctrine of collateral estoppel?

POINT I

THE UNEXPLAINED PRE-INDICTMENT DELAY, COUPLED WITH THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A CONTINUANCE, RESULTED IN ACTUAL PREJUDICE TO THE APPELLANT; THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

Count one of the Indictment alleged a conspiracy from on or about January 1st, 1968 to on or about the first day of January, 1973, to violate Federal Narcotics Laws. Despite the allegation that this conspiracy continued until the first month of 1973, the last overt act pleaded was alleged to have occurred on November 2nd, 1971. In fact, the Government elected to proceed against the Appellant, ROBERT MAHER, under now repealed Sections 173 and 174 of Title 21, United States Code. The substantive counts of the Indictment, Counts two through five, relied on acts alleged to have occurred in October and November of 1969 and February and March of 1971. As is evident from the pleading itself, there was considerable uncertainty as to the dates and locations of the alleged occurrances. As developed in our Statement of Facts, that uncertainty was not to any greater degree resolved at trial.

With regard to the Appellant, ROBERT MAHER, the dates of the alleged offenses, as set forth in the Indictment, were at best narrowed to the month and year. As detailed in another point raised in this brief, the case against the Appellant, MAHER, was the subject of prosecution in both Kings County and Bronx County. For no apparent reason other than perhaps the Appellant's success in meeting the charges against him on the State level, no Federal action was taken until the Indictment was filed on October 17th, 1973. At that time, the Indictment was ordered sealed and was not opened until the Appellant appeared on the charges on October 23rd, 1973. The case was then assigned to the Trial Court who eventually heard the matter and, according to the docket sheet, a pre-trial conference was set for October 26th, 1973. Thereafter, the case was set down for trial on November 12th, 1973, some three weeks after the Appellant first was apprised of the charges against him.

On the day of trial, Appellant's trial counsel called to the attention of the Court that counsel who had represented the Appellant previously had suffered a heart attack shortly after the Appellant's arraignment and that this occurrance caused the Appellant to retain new counsel. (A 21)

In the hiatus between the time the prior counsel had been stricken and retention of new counsel, the case had been referred to a Mr. Paul Victor, who was ordered by the Court to remain present during the trial. (T 19)[1] Partially because of the unforseen circumstances regarding the health of prior counsel who had been totally familiar with the case because of his earlier representation of the Appellant, and also because of what counsel asserted as the "complexity" of the matter, an adjourment was sought. Further grounds for the adjournment was that transactions alleged in the Indictment were four to five years old and that there were "certain witnesses" that the Appellant wished to produce. (A 22) It is particularly important to note that the adjournment requested was for a period of "no more than a week". (A 23) In sum, counsel was asking for an "opportunity to fully acquaint [himself] with the facts in this case to prepare for my client's defense". (A 23) The situation, therefore, was that counsel, retained within a week prior to trial because of a fortuitous circumstance,

[1]The letter "T" refers to the Appellant's Trial Transcript, while the letter "A" refers to the Appellant's Appendix.

was denied an opportunity to more carefully prepare a case which was based upon acts which had occurred as early as 1968 and which had been the subject of prior litigation on which other counsel had been familiar. This set of facts must again be considered in the context of an instance where the trial was beginning some three weeks after the Indictment was unsealed.

Moreover, prior to trial, Appellant's counsel joined in a Motion of co-counsel for dismissal of the Indictment on the grounds of unnecessary pre-trial delay. (A 25 - 28) This Motion was again renewed at the end of the entire case on the ground that there was nothing developed at trial to justify a delay of more than two and a half years during which the Government was obviously in possession of all the facts on which it indicted. (T 480 - 481)

Similar to the position taken at trial, the Appellant's attack on due process grounds is predicated upon the unexplained and unjustified delay in securing an Indictment from a Federal Grand Jury where the investigation had obviously been completed years earlier, together with the totally unreasonable urgency in which the case was tried. In addition

to the argument advanced below, one further supportive ground is here advanced. Plainly stated, Appellant claims actual prejudice solely attributable to the Government's delay. This prejudice surfaces in the Constitutionally intolerable uncertainty as to the dates of the alleged violations. It is unquestionably apparent that, if the Government had acted in a more timely fashion, this fatal uncertainty would have been obviated.

An example of the prejudice which resulted is easily found in the testimony of Doris Olivero, the Government's main witness against the Appellant. As to the time that the witness allegedly began to purchase heroin from the named conspirators, Mrs. Olivero was unable to fix with certainty a month and year. (T 107 - 108) As to the location of the alleged sales, the witness' recollection was equally as vague. (T 115) Continued testimony of the witness highlighted the fading of memory. (T 123) Rubin Bankhead, a Police Officer who conducted surveillance of the Appellant, had his direct testimony confined to a memorandum introduced as a "past recollection recorded" because of his failure to remember the circumstances. (T 264) It is clear,

therefore, that the manner in which the Indictment is pleaded, together with the inability of the main witness to testify with certainty as to the approximate dates and times that the acts allegedly occurred, left the Appellant in an unenviable position. This lack of specificity, therefore, rendered the Appellant unable to effectively meet the charges against him in the preparation of a realistic defense.

Legal precedent regarding a criminal defendant's Constitutional rights in terms of pre-indictment delay, has demonstrated considerable flux in that area. It is necessary, therefore, to briefly review present guidelines. Rule 48(b) of the Federal Rules of Criminal Procedure provides as follows:

> "If there is unnecessary delay in presenting the charge to a Grand Jury or in filing an information against a defendant who has been held to answer to the District Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Under this rule, therefore, the District Court had, in its discretion, the power to dismiss the Indictment based upon the inordinate delay in presenting the matter to the Grand Jury. It has been held, however, that reasonableness

of delay before presenting a case to the Grand Jury is entirely governed by the Statute of Limitations. See for example, UNITED STATES v. FREEMAN, 412 F.2d 1181 (10th Cir., 1969).

Nevertheless, other cases have recognized that inordinate delay between the commission of the offense and presentment to the Grand Jury, where that delay was not occasioned by the defendant, an actual prejudice to the defendant has evolved, the possibility of a Constitutional deprivation in terms of the Fifth and Sixth Amendments exists. As stated by the District Court in UNITED STATES v. DALLAGO, 311 F.Supp. 227 (E.D.N.Y., 1970):

> "This concept (constitutional deprivation) is so new the courts have yet to determine whether it is based on the Fifth or Sixth Amendment...."

Regardless of whether our Appellate Courts have defined it as a deprivation of due process or a speedy trial violation, recognition of the likelihood of the abridgement of fundamental Constitutional rights in a situation such as the case at bar is now widespread. In UNITED STATES v. DELONEY, 389 F.2d 324 (7th Cir., 1969), the Court flatly stated that:

> "It is possible to conceive of a delay less than the period of the statute of limitations that would be so unreasonable and the prejudice to the defendant so great, that relief under the Fifth Amendment should be afforded."

This principle has become well-established in the Seventh Circuit, where prejudice to the defendant had been demonstrated. UNITED STATES v. HAUFF, 395 F.2d 55 (7th Cir., 1968); UNITED STATES v. LEE, 413 F.2d 910 (7th Cir., 1969); UNITED STATES v. BAUM, 435 F.2d 1197 (7th Cir., 1970).

This Court has similarly recognized the possiblity of a Fifth or Sixth Amendment violation even where the Statute of Limitations has not run. In UNITED STATES v. FEINBERG, 383 F.2d 60 (2nd Cir., 1967), Judge Waterman acknowledged the possibility of a Fifth or Sixth Amendment claim in a situation where valuable evidence is lost. A similar observation was made by Judge Kaufman in CHAPMAN v. UNITED STATES, 376 F.2d 704 (2nd Cir., 1967). In UNITED STATES v. CAPALDO, 402 F.2d 821 (2nd Cir., 1968), Judge Lumbard, while restating the well-recognized principle that the Statute of Limitations is the primary guarantee against undue delay, indicated, in dictum, that where the defendant has demonstrated actual prejudice which would impair his

capacity to prepare a defense, there may be an infringement of his rights under the Fifth and Sixth Amendments. See also UNITED STATES v. COLLITTO, 319 F.Supp. 1077 (E.D.N.Y., 1970). In UNITED STATES v. DELAGO (SUPRA), Judge Zavatt summarized that:

> "The rule in this circuit appears to be that, while the statute of limitations is the primary guarantee against pre-indictment prejudice, if the defendant can show actual prejudice or an oppressive design on the part of the Government to gain an advantage (even though indicted before the statute of limitations has run), then a Fifth or Sixth Amendment violation is established warranting the dismissal of the indictment."

In DICKEY v. FLORIDA, 398 U.S. 30 (1970), Mr. Justice Brennan, in a concurring opinion, stated that:

> "Concrete evidence of prejudice is often not at hand. Even if it possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in the terms of the dim memories of the parties and available witnesses."

The uncertainty of the effect of pre-indictment delay was apparently laid to rest in the Supreme Court's decision in UNITED STATES v. MARION, 404 U.S. 307 (1971). With regard

to issues such as that raised at bar, the Court recognized that events at trial could demonstrate a due process violation because of pre-accusatory delay where actual prejudice surfaces at trial. In the instant case, the delay can be equated to the 38-month delay in MARION. The distinction here is that, in the case at bar, the dimming of memory is not a speculative possibility but rather an actuality which was clear not only in the Indictment, but at trial. It becomes abundantly clear, therefore, that the Appellant in the instant case has been actually prejudiced by the Government's delay in presenting this matter to the Grand Jury. This prejudice, it is respectfully submitted, has unquestionably reached Constitutional proportions and should have caused dismissal of the Indictment.

Again, the problem raised herein is even more complicated by the fact that after the substantial delay, which was in no way attributable to the Appellant, the Court's refusal to grant a continuance of "no more than a week" was the proverbial salt in the wound. For if the Appellant was placed in a situation where the defense of a criminal case was made more difficult by the passage of time, a request

for another week after only three weeks had passed since the Appellant had been apprised of the charges against him is, it is respectfully submitted, unconscionable. In other words, if this Court were to hold that the Appellant's Constitutional rights were not violated by the pre-accusatory delay, there would still be no question that defense of these charges were relatively complex, if only because of the time factor. Therefore, it is submitted, the failure to grant a one-week postponement where good cause was shown, amounts to nothing less than a due process violation. In view of the circumstances, it would not seem unreasonable if counsel had simply asked for another week to give more thought to the case. Here, far more tangible reasons were proffered, including the fact that prior counsel, totally familiar with the facts of the case, had been stricken with a heart attack. The arbitrariness of the Court in denying counsel's Motion for an adjournment has, it is respectfully submitted, distorted the very meaning of due process. Here, what Judge Timers has referred to as the commendable objective of disposing of criminal cases expeditiously has denied the Appellant his essential rights. UNITED STATES

POINT II

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY NOT TO CONSIDER THE HEARSAY STATEMENTS OF ALLEGED CO-CONSPIRATORS, WHERE THE JURY WAS UNABLE TO AGREE ON THE CONSPIRACY COUNT, WAS REVERSIBLE ERROR.

In the case at bar, considerable reliance was placed upon hearsay statements made by Santiago Olivero, the Appellant's alleged co-conspirators. For example, over objection of Appellant's trial counsel, Doris Olivero testified that in the early stages of the Appellant's alleged participation, her common-law husband had stated to her that:

> "I am going to do business with Bob now, I don't have to do business with Angelo anymore." (T 109)

Earlier, as to the Appellant and again subject to the objection of counsel, the witness Olivero stated that Sam told her outside the presence of the Appellant, "I met the big man". (T 106 - 107) Similarly, Carmen Berrerra testified as to what Sam had told her in reference to the conspiracy. (T 247) In essence, prior to its submission to the jury, the trial was replete with acts and declarations of alleged

co-conspirators which, according to the Court's instructions to the jury, were binding on the Appellant. (T 555)

After a little more than two hours of deliberation, the jury sent a note to the Court stating that:

> "We are tied up on Count one, if we cannot come to a decision on Count 1, can we continued on Counts 2, 3, 4 and 5?" (T 568)

In response to that note, trial counsel certainly had no objection to the jury continuing their deliberations on the substantive counts, but observed that if the jury were no longer considering the conspiracy, they should not consider the declarations of the co-conspirator, Santiago Olivero, on the substantive counts. (T 568) The Trial Court refused to give further instructions. (T 568 - 569)

It is well-settled and citation appears superfluous, that the acts and declarations by one conspirator in furtherance of the conspiracy and prior to its termination, may be used against other conspirators. DELLI PAOLI v. UNITED STATES, 352 U.S. 232 (1957); LUTWAK v. UNITED STATES, 344 U.S. 604 (1953). However, the Court here properly charged that before a co-conspirator's statements may bind the Appellant, it must be found that the Appellant joined the conspiracy. (A 46) The record is clear that the jury in

the instant case was unable to agree on the issue of whether the Appellant joined the conspiracy.

In UNITED STATES v. ELGISSER, 334 F.2d 103 (2nd Cir., 1964), the convictions were affirmed where hearsay testimony had been admitted and the Trial Court dismissed the conspiracy count at the close of the Government's case because of a failure of proof. There, however, complete and adequate limiting instructions were given to the jury. 334 F.2d at p.107. The obvious distinction between the ELGISSER case and the instant case is that there the Court found, as a matter of law, that there was insufficient evidence to sustain the conspiracy. In the instant case, there was no such finding. However, it still remained for the jury to determine whether or not the defendant on trial became a member of the conspiracy. It would, therefore, have been appropriate for the Court to instruct the jury that if a particular defendant was not found to be a member of the conspiracy, then it could not consider the hearsay declarations. It is here submitted that the Court's failure to give such instruction, where specifically requested, constituted reversible error.

POINT III

THE PROSECUTION OF THE INDICTMENT HEREIN WAS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

The Appellant ROBERT MAHER, was convicted of Counts 4 and 5 of the Indictment. Each of the counts were identical in that they charged concealment and sale of heroin, the difference being Count 4 charged these activities during February, 1971 and Count 5 charged these activities during March, 1971.

Prior to that, Appellant's then counsel moved to dismiss the Indictment on the grounds of double jeopardy and collateral estoppel. The basis for the claims were a prior trial in the Supreme Court, Bronx County and Kings County involving the Appellant in the Bronx, the Appellant was charged with possession of a weapon and possession of drugs. He was acquitted after trial. In Kings County, he was charged with possession of drugs and conspiracy, together with Santiago Olivero and Joaquin Quinones. At the conclusion of the People's case in Kings County, the Court entered a trial order of dismissal, the People never appealed from that ruling.

The pre-trial Motion to dismiss at bar was denied by

Judge MacMahon.

The main thrust of that pre-trial Motion seemed to be double jeopardy, with some reference also to the collateral estoppel aspect of it.

We submit that the denial of this Motion was erroneous. We recognize that the Court, during the pre-trial Motion, did not have all of the facts and evidence of the two completed trials before it and, of course, did not have the facts and evidence to be proffered in the instant trial.

We are now in a position to examine the evidence offered in Kings County in light of the evidence adduced at bar. The examination of the evidence in this light, we submit, supports the contention of double jeopardy, and more particularly, collateral estoppel.

In Kings County, the main witness, as at bar, was Doris Olivero, the common-law wife of the co-defendant in the Kings County Indictment. She testified that she and her common-law husband, Santiago Olivero, referred to as Sam, met MAHER in the Bronx on the 19th of March. They allegedly purchased a kilo, she and Sam came back to Brooklyn, they allegedly resold 1/2 kilo, and the balance

was buried in a building at 2418 Pitkin Avenue, Brooklyn, New York. This material is contained on pages 12 through 15 of the transcripts of the Kings County trial.

She testified at the Kings County trial to an alleged payment of $12,000.00 on March 22nd, 1971, delivered in a brown bag in the Bronx and to the circumstances attendant thereto. She further testified that of the heroin purchased on the Bronx, seven little bags of it were hidden in a vending machine in the Brooklyn premises, in addition to the material buried in the basement.

The material found in the basement and in the vending machine in Brooklyn were introduced in the Kings County trial. It should also be noted that Detective Rainey also testified in the Kings County trial.

In the trial at bar, the identical facts and circumstances were testified to. Doris Olivero testified to being arrested after receiving the narcotics in the Bronx, transporting it to Brooklyn and taking Detective Rainey into the Brooklyn premises and showing where it was in the cellar. Detective Rainey testified to observing the passing of the ubiquitous brown paper bag in the Bronx. He testified to the search in the floor in one building on Pitkin

Avenue in Brooklyn and the seizure from the vending machine in Brooklyn.

This is the very same material which was marked with the number "2" and a series of letters at bar. Objection was timely made to its admission on the theory that it was previously the subject of the Kings County trial. The material was ultimately not admitted only because the Police Officer could not sufficiently identify it, but it was offered in the presence of the jury and allowed to remain on the prosecutor's table in open view for the jury to observe it. This procedure, we submit, should have been surrounded with even greater caution because it was the corpus of the Kings County trial, and there was an acquittal in Kings County. Thus, it was open to question, not only on identification, but on the further ground that it might be inadmissible on a collateral estoppel theory.

A former judgment bars relitigation of an issue of ultimate fact which has been determined by that final judgment,

in all cases. UNITED STATES v. OPPENHEIMER, 242 U.S. 85 (1916). Our Circuit reaffirmed that rule in UNITED STATES v. KRAMER, 289 F.2d 909 (2nd Cir., 1961). In the KRAMER case, the Court was dealing with a prior acquittal in another Federal Court for post office burglary and a trial in this Circuit for the conspiracy. The Court overruled the prosecution's contention that there was a lack of mutuality and also that the verdict on the substantive count may have been on the basis that it had not the burden of proof on the entire case rather than each part thereof. Thus, any similar suggestion at bar concerning the Kings County trial of dismissal only dealing with possession, must suffer a similar fate. In this same vein, the Supreme Court has stated that to be meaningful, the rule of collateral estoppel cannot be applied with a restricted archaic, or hypertechnical view. SEALFRON v. UNITED STATES, 332 U.S. 575 (1948).

Collateral estoppel as a visible force in criminal prosecution has been highlighted in two Supreme Court decisions. The first of such cases was ASHE v. SWENSON, 397 U.S. 436, 90 S.Ct. 1189. The second case decided on the issue was HARRIS v. WASHINGTON, 404 U.S. 55 (1971). In

HARRIS, the Court dealt with two prosecutions arising out of the alleged transmission of a bomb through the mail. The first trial dealt with the transmission of the bomb; the second trial charged assault and murder, because one of the recipients was injured and another killed by the ensuing explosion. The highest State Court allowed the second prosecution on the theory that a letter deemed inadmissible at the first trial was admissible at the second trial and, therefore, the issue of identity had not been fully litigated.

The United States Supreme Court rejected that argument and restated the general rule at page 56:

> "We said that collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit. 397 at p.443, 25 L.Ed. at p.475."

(In reliance on ASHE v. SWENSON)

> "The State concedes that the ultimate issue of identity was decided by the jury in the first trial. That being so, the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence, and [405 U.S. 57] irrespective of the good faith of the State in bringing successive prosecutions."

The ultimate facts in Kings County were alleged sale of the narcotics in the Bronx to Santiago; the alleged transfer of the money; the transportation to Brooklyn; the secreting of a portion of it in the hole in the cellar and the portion of it in a vending machine and the sale of a portion to one Willie. The trial order of dismissal decided all of these ultimate facts in favor of the Appellant, MAHER and against the prosecution. Thus, clearly the issues attendant to the 5th count of the Indictment at bar were decided. The fact that the prosecution in one case was the State and in the other the United States Government, we submit that at bar there is sufficient identity of interest between the State and Federal prosecutions. The witnesses were the same, the sales counts could not be pursued in the State Court per se since they only had co -conspirator testimony. In addition, we submit that examination of the testimony in Kings County and in this trial supports the conclusion that the facts at bar were necessarily determined in that trial. UNITED STATES v. FEINBERG (SUPRA). In this trial, the critical issues are possession. This precise fact was established in favor of the Appellant, MAHER, in Kings County. To allow it to be relitigated would be to

allow relitigation of the same facts. To ascribe a different meaning to possession in both cases is to engage in an unwarranted exercise in semantics. YAWN v. UNITED STATES, 244 F.2d 235 (5th Cir., 1957). The doctrine of collateral estoppel has been said to be a rule of justice and fairness. RITCHIE v. LANDAU, 475 F.2d 151 (2nd Cir., 1973). We recognize that the issues in the Kings County trial and apparently in the Bronx County trial (although the minutes are not available), deal with events in March of 1971. The 4th Count of the Indictment deals with events in February of 1971. We submit that an examination of the trial record indicates that the bulk of the evidence adduced concerned dealings in March of 1971; the corroboration supplied by Detective Rainey particularly concerned March of 1971. It is suggested that this corroboration by Rainey of events in March could have very well turned the tide against MAHER. The co-defendant, Trabacchi, against whom there were no such direct corroborative observations, was not convicted and as to him, the jury could not reach a verdict. Thus, it is not idle speculation to suggest that since the bulk of the testimony as to MAHER concerned dealings in March of 1971 with Olivero, the corroborative observations by Rainey

were in March of 1971; and the jury hung as to Trabacchi that this evidence of the March dealings which concerned the 5th count, spilled over and must have influenced the jury's decision as to the 4th count. It is submitted, therefore, that a trial of the alleged sale in February, dependent upon Olivero's testimony without the peripheral corroboration of Rainey as to the March transactions, could have a different result. Beyond this, however, we submit that, although the Appellant was not entitled to a perfect trial, he was entitled to a fair trial devoid of improper, over-riding, previously litigated and decided issues.

In addition to the contention of collateral estoppel, we submit there is another basis for affording the Appellant relief.

We submit that the trial of this Appellant on three separate occasions violates the announced policy of Attorney General Rogers to the effect that:

> "....no Federal case should be tried when there has already been a State prosecution for substantially the same act or acts without...[the approval of an Assistant Attorney General after consultation with the Attorney General]."

This precept was honored in ORLANDO v. UNITED STATES,

387 F.2d 348 (9th Cir., 1967).

This same policy was reflected in a Department of Justice Press release of April 6th, 1959. It was adhered to by the Government in PETITE v. UNITED STATES, 80 S.Ct. 450 (1960) which dealt with a situation analogous to that at bar, viz-a-viz prior State prosecution, followed by a Federal prosecution. See also MARAKAR v. UNITED STATES, 82 S.Ct. 1573, which, although it dealt with two Federal trials, it is of moment at bar, because it is another example of the Government's observing the previously quoted policy of the various Attorneys General.

For all of the foregoing reasons, whether we label it collateral estoppel or Governmental policy, due process cries out for a reversal and a new trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction herein should be reversed and the Indictment dismissed or, in the alternative, that the case should be remanded for a new trial.

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Defendant-Appellant

GERALD L. SHARGEL
Of Counsel

Two (2)
Service ~~three (3)~~ copies of the within
is hereby admitted

day of

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Attorney(s) for

COPY RECEIVED
FEB 7 1974
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